



CITY OF ELY

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ELY CITY COUNCIL SPECIAL MEETING

October 20, 2021 3:30 p.m. – Ely Volunteer Fire Hall - 499 Mill Street-Ely, Nevada.

Mayor Robertson called the special meeting of the Ely City Council to order at 3:30 P.M.; led in the Pledge of Allegiance and asked for Roll Call.

Members present:

Mayor Nathan Robertson
Councilman Ernie Flangas
Councilman Ed Spear
Councilman Jim Alworth
Councilwoman Jerri-Lynn Williams-Harper

Members absent:

Councilman Kurt Carson

City Officials and staff present in the building or via video conference:

City Clerk Jennifer Lee (Zoom)
City Treasurer-HR Director Janette Trask (Zoom)
City Attorney Leo Cahoon (Zoom)
City Fire Chief Pat Stork (Zoom)
City Administrative Assistant Patti Cobb
Public Works Supervisor Mike Cracraft

Also, in attendance: Members of the public in attendance at the Ely Volunteer Fire Hall signed in (appears below) and the following persons attended via video conference: Chris Stanko, James Woolsey (National Park Service), Desiree Ramirez, E. Jensen, Caroline McIntosh, Kay McMurry, and Jared Bybee (BLM).

ELY CITY COUNCIL ATTENDANCE LIST

DATE: October 20, 2021

Print name below

Douglas Borch
Mark Bussett
Cody Odgers
Ten Borch
George Charles
Carl Marsh

Print name below

2. PUBLIC COMMENT

Special Meeting of Ely City Council
Wednesday, October 20th 3:30 p.m.
Public Comment
Donna Bath

Good Afternoon Mr. Mayor and City Council Members:

For the record, my name is Donna Bath, citizen of Ely and one of the nearest property owners in the Duck Creek Basin to the proposed project on your agenda today.

Our home is less than ¾ miles from the proposed project. I have many concerns regarding this project and have been watching closely since early 2019. I have attended every noticed local meeting either in person or via zoom. I have obtained and kept copies of all handouts provided at the various local meetings regarding the proposed project. The developers nor contractors have never reached out to us as an affected property owner. I have had to spend hours trying to keep up with what they are doing. It seems that their plans, documentation and messages are forever changing and we all should be concerned. (see attachments).

I would like to share some of my concerns with you today, in the form of questions and bullet points. I have added copies of some of the public documents I have gathered regarding this project for your review and consideration. I hope this information will inform and assist you.

- As an affected/interested/party; has the City of Ely been in close contact with the developer (R-Plus)/contractor (HDR) or were you invited to be a cooperating agency on the proposed project.
- Was the City offered an opportunity to comment on the EA or noticed of the comment period for the EA (Environmental Assessment). Did the City received a copy of and have you had an opportunity to review the EA or the ROD (Record of Decision).
- Was the City notified by the developer (R-Plus, Gridflex, WP Water Power) that they planned to ask that the FERC permitting

process and the BLM EA process be expedited and that these requests were granted.

- Did the Developer honor the request by the City to have more public hearings and make a bigger effort to keep the public informed?
- Were other property owners close to the project on the Steptoe Valley or Duck Creek side consulted or asked to comment on the EA by the contractor or developer?
- Upon checking, the legal property owner of the projects proposed 80 acre man camp/lay down yard (see attachments) nor the Rail Road have written agreements in place, nor have they given their permission to cross their property with heavy equipment, nor utilize private property as a staging area. One party did give HDR permission to do a plant study.
- It is very concerning that private property, city and county roads and ROW's can be placed on federal maps and documents without agreements and/or permission in place, prior to them beginning construction.
- Does the reclamation bond posted with BLM (if one has been posted) cover the City of Ely ROW and road as well as private property owners, the rail road, county roads; or do they (you) need your own bond to protect your asset?
- If these bore holes show that the sites are not a good fit for the project, the project will likely not go forward. Unfortunately, without good written agreements and bonds in place, our community will be left with severe damage to take care of at our own expense.
- I urge you to request to become a cooperating agency for the project (contact BLM) and pay very close attention to the FERC process and upcoming BLM EIS process for this project.
- The contact for the FERC process is: Shannon.boyle@ferc.gov

The attached documents (obtained from handouts from official meetings, minutes from Commission meetings, FERC web site, Environmental Assessment prepared by HDR) are included for your review.

R-Plus energy initially advised the Commission in 2019 that the property was entirely on BLM owned property. At their FERC meeting with the Board of Commissioners in September, they again advised that the project was located entirely on BLM property. At a subsequent meeting, they advised that it was all on BLM property except the 53 acres belonging to the Railroad. Later on their maps showed a large area in pink as they described as "to the east" as a temporary laydown yard/onsite camp. When pressed, they advised yes it was a man camp and lay down yard.

When asked about the man camp in Duck Creek and "their thousands of workers", the economic benefit to our community if the employees were going to live and eat in the Duck Creek Basin, they advised that they never said they were placing a man camp in Duck Creek. Please read the documentation and decide for yourself.

Gridflex, White Pine Water Project, R-Plus Energy are all the same company. They applied to the FERC (Federal Energy Regulation Commission) for an expedited permit and was it was granted, was the City noticed or were they aware of this?. The information submitted to FERC and White Pine County has changed several times and has been very difficult to follow.

It appears that the company and White Pine County as a cooperating agency ask that the EA be moved quickly or expedited. I would suggest that this would be the reason that the comment period was shortened from 45 days to 15 days and only WP County, SITT (Sage Grouse) and NDOW and Tribes were invited to comment on the project. The City of Ely was listed on their application as a political subdivision that would be interested in the project, but it appears they were not invited to participate in the preparation of the "EA". As stated before, our family nor any other residents in Duck Creek were ever personally contacted by this company, only through public emails/notices. One private property owner gave verbal permission to their consultant to conduct a plant inventory by crossing their property. It will be imperative that anyone interested in what is going on with this project ask to be placed on the "Interested/Affected Party List" at BLM for this project. Additionally, please sign up on the ferc.gov web site to be informed on what is being filed in their permit process. The Docket number for FERC application is P-14851

In the EA documents, the size of the tunnel and pipe that will carry the water from the top pond to the lower pond is anywhere from 14 to 30 feet in diameter. If the pond "reservoir" is located between the two RR tracks as now proposed, it appears that the pipe will need to go under the track. I hope the company has provided very detailed information to the City and the RR on the plan. Looking at their maps, it appears that they also want /need to realign the city road/ROW near the track. It also appears that their B-1 hole is in or very near the 100' City/RR/ROW their pads and turn around areas look to be near 100'.

At the last County Commission meeting, October 13th, they handed out a DRAFT Pumped Storage Hydro Economic Impact study prepared by Zions Public Finance, Inc. for White Pine County. The disclaimer on page one advises that the report relies on the best information available at the time the report was prepared and is subject to change. I completely agree, that the information will absolutely change. Zion relied on information provided by R-Plus as of May 2021. I would question how R-Plus could anticipate the amount of power or the cost of the materials, amount of labor etc. without having a power purchase

agreement with a company, or a known ultimate owner/operator of the project as the company has stated that they are the developers and will sell the project to another company. The report states on page 14 that they anticipate 1,664 to 2,218 direct construction jobs annually for a 3-4 year period. On page 2, they list direct jobs for the project as 6,655,59. This appears based on their information that the population for Ely will likely more than double during construction. Has there been discussions regarding the additional need for housing, hotels, restaurants, additional roads, water, sewer, schools, hospital expansion, increased fire and public safety needs etc.. This should be looked at, studied and cited in their upcoming EIS process with BLM. I would ask that the City be very involved in this process and look toward asking for a development agreement to be in place prior to construction of their project.

I would like to add, that I am very pro-business and very community and economic development minded. I am however, as a citizen, very concerned that with hasty decisions being made on promises that appear to have not been fully quantified and allowing a project to move forward utilizing private and city/ RR property without permission and not having written protection for damage to City/RR and private assets with agreements and bonds in place, we will be sorry later.

Thank you for your indulgence.

If you have any questions, please feel free to reach out to me.

Donna Bath

County Commission Chairman Richard Howe stated White Pine County Commission has voted unanimously to give support to the rPlus Energies and prior to that Gridflex. This project is a benefit for generations to come to diversify our economy throughout White Pine County. The City of Ely would be impacted by new residents and possibly new businesses. We have been a mining community for over a century and mining is still our number one, but we need to diversify based on 1983 when Kennecott shut down and there was an exodus of good residents

from White Pine County that moved to Elko and a lot of other places because there was no other place to work. rPlus Energies has had several public hearings, they have had an open house at the Bristlecone Convention Center, and they have laid out their plans for every single question. This is a long process and this item on your agenda today is to ask the City for the right-of-way to allow equipment to go up and do the drilling. There is a lot more involved in this and the construction probably won't be until 2024 or 2025. It is a 2.1-billion-dollar project and one of the largest the State has ever undertaken. It is a green energy plan, which is a benefit to everyone. This is an underground power facility with no lights exposed once it is done. rPlus has been a very good citizen by coming to all our meetings and answering all our questions. We are trying to make White Pine County have more life than just mine life. In the 1980's we had a coal fired power plant with L.A. Water and Power and it was welcomed by the citizens. It would have taken a lot more water and coal which would affect the emissions; it was shot down by a former Senator in the United States Senate. When it fell through a lot of people were disappointed. This is an opportunity to let White Pine County and everyone in the City of Ely to have a future. The White Pine County Commission stands by rPlus Energies and their project. The impacts it will have on this County are long term.

Cody Odgers, member of the Water Advisory Board for White Pine County stated instead of standing up here and stating the what-ifs as any project has what-ifs the item at hand that I see needs addressed is we are in a drought, the mine is continuing dewatering, and in the State Engineers measuring of the wells in the Steptoe Valley we have seen a destabilization of the wells right here in Ely because of the dewatering at the mine. If you continue looking down the valley, all our water here flows north and there is a continued decline in our water table as it is. The idea of it is using a ginormous amount of water; it is another straw in an already depleting resource that we have and that is the issue the City needs to look at. The City is taking water out of the same aquifer that I irrigate with and everybody in this valley drinks. I think the water being used is something that the City needs to look at explicitly when it comes to this project.

Northern Nevada Railway Foundation President Mark Bassett stated for the record the Foundation is neutral on this project. The Foundation partners with the County and the City on developing the railroad. What the Foundation is concerned with is protecting the railroad and the railroad right-of-way and how the drilling impacts that.

George Chachas stated on your agenda item 3-1 you are to consider possible approval of an easement agreement between the City of Ely and rPlus Energies, however there was nothing in the meeting packet provided to the public to see what the Council is considering. I support the project and I think the least we could do is give them consideration. As an individual and a businessman, I don't want to see any new business hampered. When you have an item on the agenda and it says approval of an agreement, that needs to be provided and can possibly violate the Nevada Open Meeting Law. Mr. Chachas stated ongoing concerns regarding the water and sewer connections to his hotel property located on Great Basin Boulevard; Access to his property on Great Basin Boulevard after construction was completed; ADA compliance on Great Basin Boulevard; acquiring a parking permit to park behind the sidewalk on the west end of his property to Town and Country on Great Basin Boulevard; and nuisances throughout the community.

3. ITEMS FOR DISCUSSION/POSSIBLE ACTION ONLY OF THE ELY CITY COUNCIL.

1. Council Members – City Attorney Cahoon - Discussion/For Possible Action – Approval of easement agreement between City of Ely and rPlus Energies for purposes of constructing a reservoir-based energy storage project located eight miles north of Ely.

Mayor Robertson stated I would like to disclose I am an employee of the Nevada Northern Railway and an employee of a construction company that does business with the drilling company, who does business with rPlus Energies. I am not a voting member of this body. For consideration today is not approval of this pumped water storage project, but what is on the table is granting access for a drill site to do a test drilling for geotechnical surveys. I would like to disclose some displeasure with the City not being contacted as a property owner. I realize this is not the final approval of this project but if the processes to be put in place are not functioning at this point in the project, I have

concerns of how they will function further down the road. The City was never contacted, to my knowledge, with the environmental study for this phase of the project. The reason we are having this emergency meeting is to grant access that should have been granted and the City should have been approached weeks and months ago. I don't know that I have anything necessarily against or for this project either. We need to make sure the stakeholders are involved and involved in ways they should be.

Councilwoman Williams-Harper stated I agree, there is not enough information and we need to talk further with our attorneys. I would like to have more confirmation and counsel with my fellow Council Members because this came up out of nowhere. I think we have had a lot of citizens trying to figure out how this affects us and what is going on. I need more information and conversation on this project.

Councilman Alworth stated I echo the same sentiments as the Mayor and Councilwoman Williams-Harper. I received the updated agreement twenty-two minutes before this meeting and have not had time to review it. I am not against the feasibility of something, for example mining which my background is in. People in mining areas are all notified that they are going to survey the land including ranchers, farmers, and those with access roads. The City was overlooked on this and to me it was a major foul. We are a small city, but we have a lot of pride and we were overlooked without a doubt. Getting a proposal last minute that we are supposed to read, absorb, and understand; I have not digested this at all. I look at the map at where bore hole one is going to be, and it looks like it is right on the track. If this test hole is to their satisfaction where they put this twenty-four-foot pipe, this project will be underground and will it disturb our rail bed foundation. There is not enough information for me and maybe they can expand a bit on how close distance wise from the rail bed and road access right of way and what is the impact if this is successful.

Councilman Spear stated I agree we did not have a lot of time to digest this. I read the first copy and the second copy I received when I got here. The only thing I found that was different is they removed the performance bond. I know the County is in support of this project and the tax revenues will all be going to the County. I want this in a public meeting because we have been ignored in this deal.

Councilman Flangas stated I am in agreeance with the other Council Members. We have never been talked to, but we are supposed to attend their meetings and comprehend what they want. My opinion is to not allow them to use roads or anything until we know exactly what is going on. There are a lot of questions that need answered and I am not in favor until we have more information.

Mayor Robertson asked City Attorney Calhoon can you give us a synopsis of this agreement that is in front of us.

City Attorney Calhoon stated the agreement essentially establishes the company's obligation to maintain and repair any damage to the roads, and it leaves the City with as little liability as possible was the intent in drafting it.

Mayor Robertson stated I did see in there that there were bond requirements and a fee requirement of \$700.00 a day. Is that typical or where was that figure pulled from?

City Attorney Cahoon stated on that amount I inquired with our City Engineer, and he figured a reasonable amount would be somewhere in that range.

Mayor Robertson stated this will be charged just for the days they are using that road or the duration of the agreement?

City Attorney Cahoon stated I believe the roads will be used every day throughout the duration of the agreement.

Councilman Spear stated it is only a ten-day agreement and it expires on November 1, 2021. It does have a five-day cancellation in it, but we will be halfway through before we can cancel it. The \$500,000.00 bond was in the first contract and not in the revised. If they damage the road going over it with heavy equipment it says they will repair the road, but I think we should still have the bond since we are talking about a historical railroad bed.

Mayor Robertson asked City Attorney Calhoon was the bond removed from the second revision?

City Attorney Cahoon stated the amount was removed, but the provision for the bond is still in the agreement

Councilman Alworth asked City Attorney Calhoon when did you receive this contract?

City Attorney Cahoon stated I was sent a form agreement sometime last week and then I drafted this agreement based on that.

Councilman Alworth stated I am sure Luigi will come to the microphone when we are ready for him, but why was the City not included in this first go around? How come we were overlooked?

Mayor Robertson stated if there are no further questions for the City Attorney, we will have rPlus Energies President Luigi Resta come to the microphone and give your report and we can ask questions.

rPlus Energies and rPlus Hydro President Luigi Resta stated there have been a lot of different topics brought up and I can't answer all of them. At the beginning we proposed a man camp on the Duck Creek side which was a mistake and I recognized that very early on in the development. As far as water rights, the County does possess the 24,000-acre feet of water rights that is intended for industrial use. The Mine has been using that and it ended this year. It is a use it or lose it industrial right to not adversely affect the farmers per water perspective. Our agreement will help keep those water rights here. As far as being consulted over time; we have made efforts and probably have not made as many efforts as we could have to come before this body in a public way. A year and a half ago we proposed a development service agreement with the City of Ely for the project and it stated the developer of the project would be responsible for any cost incurred as a result of any activity by the City and by the County. We also submitted a conditional use permit to the City Planning Commission for review of the project to say we want everybody's input in this project even in the early stages. The City, District Attorney, and the City Attorney decided not to move forward with both the agreement and permit.

Mayor Robertson stated I don't think that was the question.

rPlus Energies and rPlus Hydro President Luigi Resta stated I understand, but I want to go on record because there were a lot of things said. We will continue to do more, and this is one of the phases of development. Where we are today, is HDR is a consultant for us and they are doing the environmental licensing and permitting. They have studied the exit route for the bore hole locations, which is the work we are doing right now. There are three bore holes identified for exploration purposes: one on top of the Duck Creek side, which we are not doing; bore hole two which is halfway up the mountain, which you have probably seen and have the lights on because they are working twenty-four hours a day; and bore hole one. We did the environmental studies and they submitted it as part of the final permit. We thought, as well as the BLM, we were entirely on BLM property including the road we are accessing and that is why this has come very late. Originally in the environmental assessment (EA) the access to bore hole two was going to

take place at the western rail, which is not in service right now and cross over that to go to the bore hole one location on BLM property. When the contractor notified Mark with the railroad, he said you cannot cross there as it is not a designated crossing. That stirred the reason for this conversation of us having to cross at a designated crossing, which is at South Industrial Way, where they are crossing to get to bore hole two and where they would cross to get to bore hole one. The intention of the road use agreement that you have before you is to allow the project, contractors, and us in the next ten days to cross South Industrial Way and travel north on the road that parallels the highline trail that goes in and out of City property and onto BLM property. We were not aware that we needed additional approval by the City or by the Railroad. I don't know if that mistake was on our side, BLM, or just a misunderstanding. We went through the process with BLM and we will not cross the highline track anywhere. The EA and all the documents vary in amounts of information of what the actual easement is, and fee title is on that section. We have seen anywhere from fifty feet from center line and one hundred-foot width to two hundred and fifty feet. Our bore hole will be outside of the City and Railroad property and be on BLM property. We will make sure to stay well outside that one hundred-foot because it is being uncovered in the last hour, that the section between Ely and McGill is actually two hundred-feet total width or one hundred-feet from center line. We just went to the City Recorder to pull that. We would stay outside the City and Railroad right of way to do the Geotech work. The reason for the short time-frame is we started this process months ago to do the studies on the areas and the amount of the impact we are having on the land on BLM property is about .75 of an acre for the three different site locations with the pads and such. We are in Sage Grouse Habitat Area, so we pulled some of the bore holes that were in critical sage grouse out of that Sage Grouse Habitat Area. We then continued forward and bought net nine credits and got the decision on October 4, 2021, after the set met on October 1st, and were denied a waiver to go into the Winter Sage Grouse Habitat time period which starts November 1st. The hole Steptoe side is in Winter Sage Grouse Habitat Area and what we had asked for on the waiver with NDOW was that we could drive the cars on the existing dirt road, and they denied that. We are compressed in a time that all the work we do has to be completed by October 31st. We do have a bond in place with BLM that is about \$32,000.00 and there is an obligation to maintain the roads and leave them in as good as condition or better shape than when we started; Reck Brothers are doing that subcontracted work. One of the conditions with the Sage Grouse Ecosystem was how many trips a day are you taking and what is that vehicle traffic. For the project up on the mountain that is running twenty-four hours a day it's about twenty trips a day and that includes water trucks and movers. They are caravanning up there when they do shift change. There is not a lot of traffic, but they do need to get water out to the site. We do have a road use agreement in place with the County, so we do have an obligation that is contracted to maintain the County portion of the road to go from South Industrial Way to where the County road ends.

Councilwoman Williams-Harper stated I am going to be very honest, I just got a lot of information in a little bit of time and I also hear some questions and doubts in your voice about some information that you need to do the project. I will be honest with you I know less now than I knew earlier.

rPlus Energies and rPlus Hydro President Luigi Resta stated it originally comes from an idea on a white board and you look at different things and now we are making efforts to narrow the scope and understand it better. We don't know everything on the five-year project on day one. We come up with a broad approach and narrow it down. We are in the narrowing down process right now with the Geotech exploration which is a 4 inch bore hole that they are drilling to determine what the rock looks like underground. If the project moves forward there would be an upper reservoir of water, a lower reservoir, a vertical shaft, and everything is underground. The characteristics of the ground is one of the most important aspects of the project.

Councilman Alworth stated I was at a County Commission Meeting and you mentioned that you are not going to get to bore hole three due to weather, so are you going to come back next year? Why can't you do more due diligence on bore hole one and do it next year when you are here doing bore hole three?

rPlus Energies and rPlus Hydro President Luigi Resta stated we have the equipment here and we didn't realize we would have to go through this process. They mobilized two drill rigs to be able to complete this project in the short timeframe. From a seasonal perspective with sage grouse there is a forty-five-day annual window to access these three sites; we would have from September 15th to October 31st next year. On bore hole number one it is one of the most important sites because there is a fault line that goes north and south through that region a little bit west of the tracks. They really need to see what is under the fault line, which will help them to understand the engineering aspect.

Councilman Alworth stated what is going to be at that bore hole? Is that the lower reservoir or the turbine location?

rPlus Energies and rPlus Hydro President Luigi Resta stated the bore hole is trying to get to the fault line to see what it looks like under the ground. This was a misstep that the project made, one of the engineers had put the original reservoir between the two rails and then the engineers said the lower reservoir needed to move up hill because of the soil content. We had conversations about the rail needing moved and it was a misstep because it created agitation. Currently, the lower reservoir would be well enough down slope from the high line rail and between the two rails and would not be in the City right-of-way or the Railroad right-of-way at all.

Mayor Robertson stated if I could just clarify the Councilman's question. These bore holes that you are doing right now don't have anything to do with the final project infrastructure, they are just geological test bore holes, correct?

rPlus Energies and rPlus Hydro President Luigi Resta stated that is correct. The lower reservoir would be in the proximity of the bore hole, but I can't say it will be right where the hole is.

Councilman Alworth stated you mention the EA, and I read that EA and I find it way under prepared. There is a lot of hearsay and somewhere the ball was dropped, and the City was not notified and now it is right here in the middle of this room and what are we going to do?

Mayor Robertson stated we do have two members of the Council here that sit on the Railroad Foundation Board and I understand that rPlus Energies went to the Railroad at least a few months ago to talk about this very issue. The fact that you guys didn't know that this was partly on Railroad and City rights-of-way doesn't seem accurate to me.

rPlus Energies and rPlus Hydro President Luigi Resta stated we know the City has fee titles to the land the Railroad's on and we were trying to stay on that railroad corridor to do this Geotech work in the absence of doing a full environmental assessment, and going through the BLM.

Mayor Robertson stated I don't understand why this wasn't brought up months ago when that was the issue?

rPlus Energies and rPlus Hydro President Luigi Resta stated I didn't know and I don't think any of our consultants knew the road was controlled by the City, and to that point the railroad knew this was happening and the public did as we have been out there. We do have a letter stating we are not going to approve anything until you have your permits in place, so we now have the BLM Decision of Record to do this portion of work.

Mayor Robertson stated it shows on the EA the tribes were contacted and other people were contacted, but the property owner this is adjacent to were never sent this EA. We had to get it from a citizen who happened to have a copy.

rPlus Energies and rPlus Hydro President Luigi Resta stated we don't control that process.

Mayor Robertson stated I have tried to call the BLM and nobody returns my calls, which is entirely frustrating and speaks to the issue if the processes are not working at this juncture then the City as an entity has a concern that it is not working for the rest of the process either, which allows us as a City entity to protect the concerns of our citizens, natural resources, and infrastructure to the extent that we have control over. Is there anything you can say to that?

rPlus Energies and rPlus Hydro President Luigi Resta stated I can say we will try to take a more active position. We can't control some of the notifications, but I think we can come in front of the City Council on a regular basis to give status updates.

Mayor Robertson stated I am not so concerned about the updates. I know you have public meetings about this, and we have all attended at least one or two of them. My concern and the concern of the City is that there are processes here. We get EA's for the mines that have nothing to do with our property, but it gets mailed and we get a chance to respond and here it appears that process didn't work. We lost our ability to respond and now we are having a special meeting trying to address your concerns and the Council's concerns in time to get something done, and it is a bad position for all of us.

rPlus Energies and rPlus Hydro President Luigi Resta stated I don't think I am in the position to respond to that.

Mayor Robertson stated whose ultimate responsibility is the EA?

rPlus Energies and rPlus Hydro President Luigi Resta stated I believe it is the BLM.

Bureau of Land Management Bristlecone Field Manager Jered Bybee stated if you have been trying to reach someone at the BLM, I would like to know who you have been trying to contact and if it is one of my staff I will correct that. Nobody has reached out to me from the City.

Mayor Robertson stated I have left voicemails with Leslie.

Bureau of Land Management Bristlecone Field Manager Jered Bybee stated Leslie is the Assistant Field Manager and I will follow up with that. I will say there was an oversight in sending the EA to the City of Ely. I would also like to bring to everyone's attention that what BLM records indicate for that upper rail line, also known as the adverse, is that it is not covered under this conveyance. The legal descriptions in the Congressional Conveyance do not reach over to that adverse; they follow the lower line that goes up to Elko County. Another authorization that we have is a right-of-way FLPMA Grant and it was issued in 1987. Our records do not indicate that road is owned by the City and I think that is something that really needs to be looked at. We have made a request to our records depository in Denver to pull the original records to ensure that it does go along the upper adverse. Based on what we have, that is open public access if they are not on the track or the bed. The track and bed itself are not BLM property, but it is the City and the Railroad's property. We did have some verbal conversations with the Railroad about rPlus Energies and some of their requests for going over tracks. We did put that they do need to get that permission to go over any tracks; and they have had those conversations as far as we know. They have been told no; you cannot cross there because it is not a public crossing. That is where BLM's perspective on this. I apologize for the oversight and that is normally not how we do business and it has put the City in a bad situation.

Mayor Robertson asked NNRYP President Mark Bassett, "Is that the Railroad's understanding as well or is there a discrepancy that we need to resolve?"

NNRYP President Mark Bassett stated there is a discrepancy that we need work out. I found this out twenty minutes before this meeting that the Railroad owns the property per the Congressional Conveyance and the BLM doesn't have those records.

Gage Zobel stated I am with the Law Firm Dorsey & Whitney and I represent rPlus Energies. I just want to speak to the local businesses; I think I can explain part of the process. I was out of private practice for six months and have recently just entered private practice again with Dorsey & Whitney, so I don't know the environmental assessment (EA) that went through here. I do know that you brought up a concern if in the future the City would be responded with and brought into any future EA's.

rPlus Energies and rPlus Hydro President Luigi Resta stated the reason we are here before you today and have not went out there is because from the perspective of our access and easement and direction of the BLM we don't need it and we could have mobilized, but we want to be good neighbors in the community. That was our reasoning of working with the Railroad and the City Council is we want to do well here. I think the question is does the Railroad or the City have the right to deny us access to this, and it is something that is going to be a longer legal issue for the Railroad and the City if it is just in fact a right-of-way? We are spending money with people standing by to be able to do this work and again we want to be good neighbors.

Councilman Flangas stated as a past owner of rural property there are dirt roads that go in and out of your property and though it is on your property, you don't own that road.

NNRYP President Mark Bassett stated just before this meeting we spoke with our Service Transportation Board Counsel. The Surface Transportation Board in Washington, D.C. governs all railroads and we have Surface Transportation Board authority to operate on that track. When this question came about ownership we asked and we do have a right-of-way from 1907 to use that track. Our records show our right-of-way is one hundred feet on either side of that track. Does that mean we control the entire right-of-way? When we asked our Surface Transportation Board Counsel they said, yes it does, even though it was granted from the federal government and it may not be fee simple. Regardless of its fee simple, we definitively have the right-of-way and it was granted in 1907.

Mayor Robertson stated what would it take to grant them access to just cross that unpermitted crossing rather than go down this road?

NNRYP President Mark Bassett stated that is not doable. Railroad crossings are controlled by the Federal Railroad Administration and by the Surface Transportation Board. Another point I would like to bring up is rPlus Energies approached the Foundation back in March and the Foundation had a meeting on April 1st. The Foundation thought the request to use part of the railroad right-of-way was premature until they had their permits and I wrote a letter to rPlus Energies regarding this dated April 4th. We said once you get your permits, please come back to us and the first time I heard back from rPlus Energies on this issue was October 7th.

Chris Stanko, Esq. with Maupin, Cox, and LeGoy stated I am counsel for the City of Ely in a different matter. I am solely speaking at this moment as counsel for the Foundation and there has been a conflict waiver to allow me to do so by the City. I was just recently made aware of a potential agreement and what the situation was. By our preliminary work it does look like the gentleman from the BLM is correct in respect that it is not a part of the interim conveyance in 2005 from the federal government. There is still clearly a right-of-way there, and again I have not had a chance to do full diligence and look at all

the primary source documents giving rise to these rights. In consultation with the Federal Railroad counsel, even though we don't have a fee interest, we do have the right-of-way and I struggle to see the differentiation, other than you would be violating federal rail law. From a property owner perspective of being on the bed of the track or being right next to the track on an adjacent service road that is still within the right-of-way. My client would have to approve, but in my mind, this could be solved by a short-term license agreement. I know there is mention of an easement agreement which I don't think is appropriate or proper, but a short term license agreement where rPlus Energies would be bound to restore the road to the condition it is in now and indemnify the City and the Foundation for coming within the right-of-way and conducting significant commercial operations within the right-of-way and all that entails could be a potentially proper solution to this. I would have to know more about it but I wouldn't concede to the BLM gentleman's legal conclusion that neither the Foundation or the City as holders of a right-of-way have no rights whatsoever to control what kind of operations are conducted within that right-of-way. There is also the question of if the track is in operation, it is subject to FRA regulations, STB authority, and it's in the Interstate Rail System. The problem could be resolved via a carefully crafted short term license agreement for these ten days if all parties are amenable.

Mayor Robertson stated at the very least the Railroad has a right-of-way, at best the City owns the right-of-way and fee simple outright?

Chris Stanko, Esq. with Maupin, Cox, and LeGoy stated it is somewhere between the two and I would not want to totally commit at this time with the very short window of diligence I have had, but by all indications it is just a right-of-way right now and not a fee simple interest.

Bureau of Land Management Bristlecone Field Manager Jered Bybee stated one thing I think the City needs to be aware of is that access road has been maintained going on BLM land and onto the right-of-way by the Railroad. There is some ingress that has gone on since that has been used by the public a lot. The agency has never worried about any enforcement on that road. The Council does need to be aware that technically any maintenance that is going on where it goes into BLM and back into the right-of-way is not part of that right-of-way. Any agreement that is made between the parties should not include any of that road that is not part of the right-of-way.

Councilman Alworth stated this oversight has led to this big issue and now skeletons are coming out of the closet about Railroad right-of-way and City right-of-way. What is the cost you would project by delaying bore hole one until next year when you do bore hole three?

rPlus Energies and rPlus Hydro President Luigi Resta stated Mr. Bassett stated he wasn't notified until after October 7th which is probably accurate; we did not get the permit until October 4th. Since we were told not to cross the railroad as Gage mentioned we have put that second crew on hold, and the rig is sitting in the Reck's yard. It is costing us about \$20,000.00 a day for them to be on standby. Over the last seven days it has been about \$150,000.00 we have incurred in cost. They had to mobilize the equipment from Spokane, Washington and bring that special equipment here. We currently have three crews on site here in Ely; two crews that are working 12-hour shifts up on bore hole two and one crew that is on standby for the second rig. That includes crews that are the actual operators of the drill and crews for GEI, who are the Geologists who are doing the data logging from the core samples that are pulled. We have technically two companies here and this round of effort for mobilization was around \$1.2 million. Bore hole one is a critical component because it sits on that fault line. We will have to mobilize next year to do bore hole three and we still need to work on access.

Councilman Alworth stated this kind of money on this oversight somebody has to be upset. Who are you answering to? I would hate to be in your shoes spending \$20,000.00 a day and not be doing anything.

rPlus Energies and rPlus Hydro President Luigi Resta stated with the rest of the money we are spending we are getting information.

Gage Zobell with the Law Firm Dorsey & Whitney and on behalf of rPlus Energies stated in reference to what Chris Stanko, Esq. stated, I think it is a missight in what is listed in the Council agenda tonight. It is not an easement agreement, it is a license agreement that your attorney, Leo Cahoon, put together. It is a limited license and I think it represents what Counsel Stanko said he might be amenable to as he counsels the Railroad. I think it should be a license agreement that is freely revocable within ten days.

Mayor Robertson stated the agreement does say short-term license agreement.

Gage Zobell with the Law Firm Dorsey & Whitney and on behalf of rPlus Energies stated I believe that is what Counsel Stanko mentioned and that is what we wanted to put together. It is a license agreement as there will not be real property rights granted to us and it is freely revocable. If that is what the Council wants, and it would make the Railroad happy, I think we are amenable to be able to work on this. I will work on it over night to make sure Luigi has a chance to look at it as their attorney and can approve it if that will help this move forward.

Councilman Alworth stated I think we have an issue now in that the agenda does not match the agreement and the public has not seen this document. I agree with Mr. Chachas, are we getting ourselves into an Open Meeting Law Violation?

Mayor Robertson asked City Attorney Cahoon, "What is your guidance on that?"

City Attorney Cahoon stated it caused me some pause. The language for the agenda item was slightly inaccurate and that was an oversight on my part and with a short notice to be posted, it was posted before anything could be changed. I sought opinion from other counsel and I don't know if there is a hard-set Open Meeting Law Violation. The license agreement was provided to the Council this evening and that is the correct language for the item and what is going forward today.

Mayor Robertson stated the language on the agreement that got sent out?

City Attorney Cahoon stated that is correct.

Mayor Robertson stated is there an issue with that being received only an hour or less before the meeting?

City Attorney Cahoon stated I want to say no, but it does straddle the line. I don't think we are in blatant violation of the Nevada Open Meeting Law. There are some prior opinions from the Attorney General's office that touched base on this, but it is a matter of interpretation and opinion.

Councilman Spear stated I am always concerned about getting something like this so late in the game. I do believe the Nevada Open Meeting Law states anything provided to the Council has to also be provided to the public at the same time. I don't think we have any violation of the timeline this information was given to the Council and the public, but my concern is even if we decide we want to work with this, the easement agreement against the license agreement doesn't match and it is supposed to be very concise on your agenda. Even if we rescheduled this, we would not be able to have a meeting until Tuesday and what would that do to your guys timeline?

Mayor Robertson stated I would tend to agree with our Attorney in that the wording between the agenda and the top of the agreement is a huge issue.

City Attorney Cahoon stated it is not an easement in legal terms, but it is the right to use a roadway. I don't think it is a blatant violation of the Open Meeting Law with the map that was provided and the agenda item showing the road.

Councilman Alworth stated if some person was to file an Open Meeting Law Violation would it hold up what we are talking about right now until it is figured out?

Chris Stanko, Esq. with Maupin, Cox, and LeGoy stated on behalf of the Foundation one of the first issues I had with this was the Development Agreement between the City of Ely and the Foundation and that is what you will see there in the draft license agreement. As a condition of entering into this draft license agreement the Foundation would have to approve it per the Joint Development Agreement which covers the historical line, including the high line portion. The Foundation is supposed to control the joint assets. They are not supposed to encumber, sell, convey, gift, or otherwise transfer any joint asset without first obtaining the prior approval of the City. The question whether or not this short-term license agreement of this nature would fall within that language where the Development Agreement structure is that neither party is supposed to encumber, sell, convey, gift, or otherwise transfer any joint asset, which I interpret this right-of-way legal right to be without the prior approval of the other. However, the Foundation also has the exclusive right to operate the historic line per the Development Agreement. There is a potential interpretation that would lend itself to the City not voting on this per a potential Open Meeting Law Violation and I have no opinion on this and have not been engaged to render one. The Foundation being able to execute the license agreement as an accommodation to rPlus, and I think the record should state that we have been running fast and hard since we heard about this. We are neutral, but I know the Commission has been a great ally to the Foundation. We want to be neutral, but we have been trying to accommodate a potential request with our neutral position. We have been working around the clock to get this out in the very short notice that we had. A solution could be that the Foundation could vote within the Development Agreement and could grant this short-term license but could not grant an easement agreement. It is vague in the Joint Development Agreement and if the City were to object and believe that the specific provision of the Joint Development Agreement that I am referencing would necessitate City prior approval, then I would yield to the City's position on that. This is all up to my client as well. I have no authority to make these decisions on behalf of my client, but I am raising it as a potential possibility.

Mayor Robertson stated thank you Chris and Leo do you have a thought on who could approve this?

City Attorney Cahoon stated my understanding is based under the Joint Development Agreement that both the City and the Foundation as joint parties should approve the agreement.

Mayor Robertson stated if the Council decides to approve something here today, and I don't see the Foundation as a signatory on the agreement. What you are saying is this is a draft that would have to be approved by the Railroad Board as well, is that correct?

City Attorney Cahoon stated based on the reading of the Joint Development Agreement in section 3B-IV I think that is what Mr. Stanko is sticking to and I would agree.

Mayor Robertson stated now that it is all clear as mud and we have talked about this for one hour and fifteen minutes does the Council have any further questions or anyone else they would like to hear from in the room or is there a motion from the Council of what they would like to do here.

Councilwoman Williams-Harper moved to table this item until we have more information, and everyone has their ducks in a row. There was no second.

Councilman Alworth stated your motion to table this item is to bring it back with better detail?

Councilwoman Williams-Harper stated yes, better detail from all sides.

Mayor Robertson stated is that to have an emergency meeting next week on Tuesday?

Councilwoman Williams-Harper stated we would have to as that is the only way we will be able to get the information and the public to have the information at the same time.

Mayor Robertson stated I want to be clear the Clerk did confirm that the public did have access to the information the same time the Council did; so that is in compliance with the Nevada Open Meeting Law, as we understand it. If I can be clear and understand the other information you are wanting is if the City owns the property or if it is just a right-of-way and is that something that can be resolved in a matter of three business days?

Councilman Alworth stated if we table it, it is not going to give rPlus Energies time to do anything, but I don't want to be faced with an Open Meeting Law Violation over us thinking the wording is the same.

Mayor Robertson asked rPlus Energies if we approve something Tuesday afternoon does that give you time to do the work?

rPlus Energies and rPlus Hydro President Luigi Resta replied, no.

Mayor Robertson asked NNRY President Mark Bassett can we find the answers to Councilwoman Williams-Harper's questions by Tuesday.

NNRY President Mark Bassett stated I don't know.

Mayor Robertson stated I personally don't know that we could have that resolved by next Tuesday. The congressional issue was in 2005 and we are still having questions about it as it gets corrected over the years.

NNRY President Mark Bassett stated that is part of the issue is we have the interim conveyance, but we don't have the final 2005 conveyance. The issue is I have never seen the actual survey supporting the interim conveyance and we have requested that from the BLM.

Bureau of Land Management Bristlecone Field Manager Jered Bybee stated the survey has not been done.

Commissioner Howe stated you listen to your attorneys, Mr. Stanko and Mr. Cahoon, and what we have here from the cost that is being incurred by rPlus Energies each day is if you put a simple agreement in place to allow them access for the next ten days and be able to shut it down within seven days is a solution. It is such a short time, and the cost of this project to the developer is over \$1 million. I think it is something you can look around to allow them the seven days to get their vehicles up there to do the bore holes, because on October 31st they have to shut down until next April. The cost of bringing the equipment from Washington to here! I am just trying to use common sense and Mr. Stanko stated it would be legal. If you wait until Tuesday, there is no way it can be done and the cost to the developer or anybody is almost to the point of ridiculous. I think you have been given good advice and maybe you can vote on a short-term alliance tonight allowing them to go ahead and access the road and then will have six months to find all this information out. The Commission is one hundred percent behind this project.

Mayor Robertson asked City Attorney Cahoon if there was any further guidance on how to proceed and avoid an Open Meeting Law Violation?

City Attorney Cahoon stated I don't, I think everything has been addressed in that the information was provided to the public. The only real issue is the discrepancy in the item, and I don't think it will render an Open Meeting Law Violation.

Mayor Robertson stated do you feel proceeding is a defensible course of action?

City Attorney Cahoon stated I do.

Mayor Robertson stated the options are deciding tonight or postpone until next spring, as postponing until Tuesday doesn't buy anybody any time.

Mayor Robertson stated item will die for lack of motion.

4. PUBLIC COMMENT

Donna Bath stated I agree with what has been said here tonight and in BLM's defense, and correct me if I am wrong Jerad. rPlus Energies hires the third-party contractor who is HDR who did the environmental assessment. I think if anybody should be mad, it should be rPlus energies at HDR because they did not contact affected property owners, did not contact grazers, did not have a road agreement to use the Duck Creek Road, and they didn't have a railroad right-of-way agreement. To use the excuse they didn't know, they have access to the Assessors website just like I do and that is where I got my information. I am pro-development and pro-business, but there is a right way to do things and a wrong way to do things. I don't think it is private property owner's problem or the City's or Railroad's or anyone else to have to absorb cost or liability without having proper documents in place.

Jim Alworth stated I am commenting on behalf of the private citizens. This project is huge and there is going to be a lot of money spent if it goes through. Again, I stated as a Council Member the feasibility is good. I think HDR needs to start advising the public and give them notice that this project is bigger than huge. They are talking about a twenty-four foot bore hole. You are not going to see anything above ground. They are going to bore a hole slightly smaller than what was bored into Yucca Mountain; from the top of the mountain down to where they are drilling into bore hole two. There will be a twenty-four-foot hole down to where the turbines are going to be nine hundred feet below the surface. They are going to have to do maintenance on those turbines, so they are going to have to have an access road underground from who knows where to take huge equipment in there. The problem is those holes are supposed to last for one hundred years and if it doesn't last for one hundred years you have big columns of nothing. At Yucca Mountain and various other places, agencies are looking to store stuff in these underground caverns. A lot of stuff can happen in fifty to one-hundred years; we could all be on nuclear power by then. HDR needs to start telling the public the size of the bore holes in this project.

George Chachas stated I am disappointed in all of you folks. This is just a request for an easement to use a road which they are paying \$700.00 a day for. All these people are doing is a study and we need to progress in this community. The fact that you are not allowing an easement for them to go across that property is an insult. I find it interesting the only time most of you agree with me is when the Open Meeting Law is in your favor to kill a project. I am concerned about this community. I am pro-business and you are not. You are speculating on what may or may not happen. Mr. Chachas stated ongoing concerns regarding selective enforcement; his request for a complete list of parking permits on Great Basin Boulevard; and RV permitting throughout the City.

rPlus Energies and rPlus Hydro President Luigi Resta stated I wanted to respond. Currently in the United States there are forty-three operating Pumped Storage Hydro Projects that are very similar to this one. There are two different types of pumped storage hydro projects. There is a closed loop, which this one would be, with an upper and lower reservoir and it is not a part of another body of water. The other is an open loop which an existing reservoir would be the top or bottom reservoir. The Castaic Project in Los Angeles just renewed their FERC License after fifty years for another twenty-five years. Globally there is approximately two-hundred and fifty pumped storage hydro projects that are in operation and historically only one of those projects have been retired. The statements you are saying that you don't know what is going to happen I don't think are fair as these are proven technologies. The comparison to Battle Mountain Nuclear Waste, I don't think is relevant. The intention is you would access the underground powerhouse from the Steptoe side through a truck driving access bore hole and the rest of it is underground. We would have to get heavy equipment up to the top on the Duck Creek side to move dirt. The way they bore the hole is from the inside and up and let the tailings fall and then haul them off. The tailings that come out will be used for the dam and embankment work.

Cody Odgers stated I have been at every meeting that Luigi and these folks have been at and have been very involved. The issue today was just about the right-of-way, but it is the overall picture that everybody needs to get together on and figure out. Of all the pumped storages that I

am aware of, they are all near a body of water. In the driest State in the Union and in the driest year in history, the use of ground water in a project like this does not make any sense. I am not poo pooing the idea of the project. I think the project is a necessity in the country, but in the use of ground water lies my issue.

Mayor Robertson stated I would like to thank everyone’s attendance here today and those that came and offered information from the various departments and entities involved; it was invaluable to have you here.

5. ADJOURNMENT: THE MEETING MAY BE ADJOURNED BY APPROPRIATE MOTION OF THE CITY COUNCIL.

Councilman Alworth moved to adjourn the Special meeting of the Ely City Council at **5:05 p.m.** Councilwoman Williams-Harper seconded the motion. The motion carried unanimously.



MAYOR



ATTEST